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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1029

KENNECOTT COPPER CORPORATION, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 526 F. 2d 1149.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1975. The petition for a writ of certiorari was filed on January 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency correctly interpreted Section

110(a)(2)(B) of the Clean Air Act, 42 U.S.C. 1857c–5(a)(2)(B), to require that state implementation plans, designed to meet national ambient air quality standards, must use continuous emission reduction techniques to the extent available and may not rely on intermittent or supplemental emission control measures on a permanent basis.

STATUTE INVOLVED

Section 110 of the Clean Air Act, as added by the Clean Air Amendments of 1970, 84 Stat. 1680, 42 U.S.C. 1857c–5, is set out in pertinent part at Pet. 2–3.

STATEMENT

The Clean Air Act, 77 Stat. 392, as amended, 42 U.S.C. 1857, *et seq.*, requires the Administrator of the Environmental Protection Agency to promulgate national primary and secondary ambient air quality standards that will protect the public from known or anticipated adverse effects of various air pollutants. Each State is primarily responsible for assuring the quality of the air within its territory and must devise a state implementation plan designed, at a minimum, to implement, maintain and enforce the national primary and secondary ambient air quality standards.

Under Section 110(a)(2) of the Act, 42 U.S.C. 1857c–5(a)(2), the Administrator is required to approve a state implementation plan if he determines, *inter alia,* that "it includes emission limitations, schedules, and timetables for compliance with such limitations * * *" (Section 110(a)(2)(B), 42 U.S.C. 1857c–5(a)(2)(B)).

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The Administrator previously had approved those provisions of Nevada's plan relating to control strategy except those involving control of sulfur oxide emissions from petitioner's McGill smelter, the only major source of such emissions in the Nevada Intrastate Air Quality Control Region (Pet. App. 3a). On June 14, 1974, the State of Nevada submitted amendments to its plan that would have required application of constant emission control technology to reduce sulfur oxide emissions from the smelter by 60 percent of the sulfur contained in the unprocessed ore. In order fully to meet all ambient air quality standards, the amendments envisioned the use of a new 750-foot tall smokestack and also would have required use of "supplementary" or "intermittent" control systems designed to control emissions further by curtailing or discontinuing production on days when meteorological conditions were conducive to ground level concentrations in excess of the ambient air quality standards. 40 Fed. Reg. 5509–5510. The Nevada amendments would have permitted use of these supplementary control systems on a permanent basis and did not require application of additional direct emission controls as they became available. 40 Fed. Reg. 5510.

On February 6, 1975, after public hearings, the Administrator disapproved Nevada's amendments and promulgated substitute sulfur oxide emission limitations pursuant to 42 U.S.C. 1857c–5(c). 40 Fed Reg. 5508, *et seq.* The Administrator determined that an 86 percent reduction in sulfur oxide emissions was necessary to meet the ambient air quality standards (Pet. App. 6a), but recognized that attainment of that emission level could not reasonably be achieved at present

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using only constant emission reduction controls. The EPA Administrator's regulations therefore provided that, as a temporary measure, petitioner may install certain already ordered constant emission reduction technology that would produce the 60 percent reduction contemplated by the Nevada amendments, and must employ such additional and supplementary control measures or other dispersion techniques as may be necessary to meet the air quality standards. 40 C.F.R. 52.1475(e)(7); 40 Fed. Reg. 5515. The Administrator determined, however, that the permanent use of such techniques could not be justified.[1] He therefore directed petitioner to carry on or support a research and development program directed at attaining compliance with those standards solely through constant emission reduction techniques, and to adopt improved technology as it becomes available for use. 40 C.F.R. 52.1475(e)(13), (15); 40 Fed. Reg. 5516, 5517. As stated in the preamble to the regulations (40 Fed. Reg. 5510):

> EPA will approve such measures as intermittent production curtailment and use of dispersion techniques, including tall stacks, as an addition to available constant control measures, until such time as the treatment of weak gas streams can be accomplished through reasonable retrofit control techniques. Evaluation of the availability of constant control techniques which may be developed in the future will be made using the same criteria

[1] In its Memorandum in Support of Petitioner, the State of Nevada overlooks the Administrator's distinction between the temporary and permanent use of supplementary control techniques. It erroneously contends that "[t]he only material difference between the [f]ederal plan and the Nevada plan" is the requirement that petitioner conduct a research program (Nev. Mem. 2).

> as were used in developing these regulations. Namely, [supplementary control systems] will continue to be allowed where permanent production curtailment, shutdown or delays in attainment of national standards are the only other alternatives.

Petitioner filed a timely petition for review of the Administrator's actions in the United States Court of Appeals for the Ninth Circuit. The State of Nevada intervened in support of petitioner. The court held that Section 110(a)(2)(B) of the Clean Air Act requires the use of constant emission reduction technology and that the Administrator therefore had properly rejected that portion of the Nevada plan that would have permitted the permanent use of intermittent controls. The court concluded that the Administrator acted within the scope of his authority "in refusing to accept intermittent controls as adequate compliance with the statute" (Pet. App. 13a).

ARGUMENT

Petitioner contends (Pet. 10–12) that the Administrator's disapproval of that portion of the Nevada implementation plan allowing permanent use of supplementary control measures exceeded his authority under the Clean Air Act. It argues that in implementing its "preferred strategy" of constant emission reductions for attaining and maintaining ambient air standards, EPA derogated from the power of the States to formulate emission control strategies, in violation of the statutory division of pollution control responsibilities between the federal and state governments. However, EPA's adoption of this strat-

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egy was not a discretionary act but a mandatory response to the manifest congressional intention that ambient air standards be met whenever possible by continuous emission control limitations.[2] Its rejection of the Nevada amendments was in strict compliance with its assigned role under the Clean Air Act. The decision of the court of appeals therefore is correct, and it does not conflict with any decision of this Court or any court of appeals.[3]

1. Section 110(a)(2)(B) of the Clean Air Act, 42 U.S.C. 1857c-5(a)(2)(B), requires that every state implementation plan include

> emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls.

Every court that has considered this language has construed it to require the use of all available measures for continuous limitation of emissions. See *Natural Resources Defense Council, Inc.* v. *Environ-*

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[2] Thus, the State of Nevada incorrectly asserts (Nev. Mem. 3) that the Administrator's sole justification for requiring continuous emission limitations was their "convenience and ease of enforcement". This argument is also implicit in petitioner's references to the Administrator's "preferred strategy" (see Pet. 2, 5).

[3] In *Union Electric Co.* v. *Environmental Protection Agency*, No. 74-1542, argued January 21, 1976, we contended that upon judicial review of the Administrator's approval of a state implementation plan under the Clear Air Act, the court may not consider claims that compliance is economically or technologically infeasible. As we argued in that case, there is no requirement in Section 110(a)(2) of the Act, 42 U.S.C. 1857c-5(a)(2), that in deciding whether to approve a state-submitted implementation

mental Protection Agency, 489 F. 2d 390, 406–409 (C.A. 5), reversed in part on other grounds *sub nom. Train* v. *Natural Resources Defense Council*, 421 U.S. 60; *State of Texas* v. *Environmental Protection Agency*, 499 F. 2d 289, 311–313 (C.A. 5); *Big Rivers Electric Corporation* v. *Environmental Protection Agency*, 523 F. 2d 16 (C.A. 6), petitions for a writ of certiorari pending, Nos. 75–774 and 75–787.

In *Train* v. *National Resources Defense Council*, *supra*, 421 U.S. at 78, this Court stated that state implementation plans to attain and maintain national ambient air standards

> must include "emission limitations," which are *regulations of the composition* of substances emitted into the ambient air from such sources as power plants, service stations, and the like. They are specific rules to which operators of pollution sources are subject, and which if en-

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plan, the Administrator must consider whether compliance with the emission limitations therein is feasible. Accordingly, so long as the plan is sufficient to achieve ambient air standards and requires continuous emission limitations, it must be approved.

If, however, a state plan appears facially inadequate in that it could be construed to permit intermittent emission limitations, the Administrator must review it to determine whether the intermittent controls are justified. Only if the demonstration of adequacy which must accompany the submission of each implementation plan shows that constant emission controls are unavailable will the Administrator approve a plan that permits use of dispersion technology such as intermittent controls. Thus, the Administrator does not review the feasibility of compliance with a state-submitted plan where it is adequate on its face, as in *Union Electric*, but will consider feasibility only in determining whether special circumstances justify approving an apparently deficient plan that fails to include constant emission limitations necessary to obtain approval under Section 110(a)(2), resorting instead to dispersion techniques.

> forced should result in ambient air which meets the national standards [emphasis supplied].[4]

As had the Sixth Circuit in *Big Rivers, supra*, the court below correctly interpreted this statement to mean that "emission limitations" do not include regulations that merely regulate the time during which pollutants may be dispersed into the atmosphere or the altitude of the smokestack through which they are dispersed, which are the effects of intermittent or supplemental control systems (Pet. App. 10a–12a).

2. The purpose of the Clean Air Act further confirms that Congress intended to require that state implementation plans require continuous emission controls if available. National primary ambient air quality standards are those "requisite to protect the public health," 42 U.S.C. 1857c–4(b)(1); national secondary ambient air quality standards are those

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[4] To be sure, the Court in *Train* held that "so long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments" (*id.* at 91). But the Court was referring to modification of source-by-source emission limitations fixed by the State, which the Administrator must approve so long as the state plan as a whole provides for a mix of emission limitations from all sources sufficient to meet national air quality standards; if these limitations are sufficient, the Administrator may not raise the limitation on a particular source to force technological improvement as to that source. The Court did not thereby preclude the Administrator from withholding his approval of state implementation plans that did not employ "emission limitations" or that could be construed to permit intermittent emission controls when continuous controls were available. Nor did it prevent the Administrator from seeking to force sufficient development of technology so that ambient air standards may be met solely through emission limitation controls, rather than by supplementary techniques (Pet. App. 11a–12a n. 22).

"requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air," 42 U.S.C. 1857c–4(b)(2). State implementation plans must provide for attainment and "maintenance" of these standards, 42 U.S.C. 1857c–5(a)(1). Intermittent controls, however, do not provide a sufficient guarantee that national primary and secondary ambient air quality standards will be maintained. As the court below stated (Pet. App. 11a–12a):

> Intermittent control systems (such as those restricting production, or utilizing less polluting fuels, during periods of adverse weather) do limit the amount of pollutant emitted while such controls are being applied. However, the reliability and enforceability of such controls is questionable; they may not be implemented when they are in fact needed. Moreover, there is no assurance that temporary reductions in emissions resulting from such controls will not be balanced, or even exceeded, by an increase in the amount of pollutant emitted when weather conditions improve and production is increased to make up for prior losses, or more polluting fuels are again used. Thus, intermittent controls, like tall stacks, may only disperse the pollutant rather than reduce it. Tall smokestacks disperse a pollutant through greater quantities of air; intermittent control systems disperse a pollutant through longer periods of time. Neither assures a reduction in the quantity of the pollutant eventually emitted. Under section [110(a)(2)(B)], EPA may require that assurance [footnote omitted].

Moreover, since the use of dispersion techniques merely regulates the timing or altitude, but not the quantity, of pollutants discharged into the atmosphere (Pet. App. 11a–12a), it is at odds with the policy of nondegradation in the Clean Air Act.[5] As the court of appeals stated in *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 489 F. 2d at 408–409:

> Dispersion * * * techniques operate by keeping pollutants out of areas of high pollutant concentration, and dispersing them to lower concentration areas; their objective is to reduce concentrations in high-concentration areas. Inevitably, however, the pollutants emitted into the atmosphere must end up somewhere; and the atmosphere at their destination, wherever that may be, will be degraded, in violation of the congressional policy. The only techniques fully capable of guaranteeing non-degradation are [continuous] emission limitation techniques.[6]

3. "[S]ubsequent legislation declaring the intent of an earlier statute is entitled to significant weight," *National Labor Relations Board* v. *Bell Aerospace Company,* 416 U.S. 267, 275, and the legislative his-

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[5] This policy requires that areas of clean air, where air quality indices are above the levels set by the national ambient air quality standards, must not be degraded, even though degradation will not reduce the quality of the air below levels specified by the standards. See S. Rep. No. 91–1196, 91st Cong., 2d Sess. 2 (1970); H.R. Rep. No. 91–1146, 91st Cong., 2d Sess. 1, 2, 5 (1970); *Sierra Club* v. *Ruckelshaus,* 344 F. Supp. 253, 255 (D. D.C.), affirmed *sub nom. Fri* v. *Sierra Club,* 412 U.S. 541.

[6] The court classified both tall stacks and intermittent controls as dispersion techniques (*id.* at 394 n. 2).

tory of subsequent amendments to the Clean Air Act shows that Congress intended that state implementation plans should require the use of continuous emission controls when available (see Pet. App. 13a–22a).

Congress amended the Clean Air Act in 1974, in response to the 1973 oil embargo and energy crisis. As it passed the House of Representatives, the 1973 predecessor to the 1974 amendment, which subsequently was vetoed, permitted the permanent use of intermittent controls at certain emission sources.[7] The Conference Committee eliminated this provision and in its draft permitted intermittent controls only upon pollution sources that converted to coal, and then only as a temporary relief measure under specified conditions.[8]

In March 1974, the Administrator transmitted a new proposed bill to the House which, in pertinent part, was the same in substance as the statute eventually adopted. The Administrator also transmitted another proposal, which he did not support, that would have amended Section 1857c–5(a)(2)(B) to provide that nothing in that section was to be construed " 'to preclude use of * * * intermittent control measures.' " [9] The Administrator stated that this proposed amendment, which was intended " 'to allow the use of intermittent control strategies as a permanent

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[7] Murphy Amendments to H.R. 11450, Section 201, 93d Cong., 1st Sess. (1973); 119 Cong. Rec. 41775–41777 (1973).

[8] S. Conf. Rep. No. 93–663, 93d Cong., 1st Sess. 83–84 (1973).

[9] Letter dated March 22, 1974, from Russell E. Train, Administrator of EPA, to Hon. Carl T. Albert, Speaker of the House of Representatives, attached to H.R. Rep. No. 93–1013, 93d Cong., 2d Sess. (1974). (See Pet. App. 13a–19a.)

method for achieving compliance with stationary source emission standards' ", would " 'significantly weaken the Clean Air Act.' " The Administrator reaffirmed the contrary position taken by the Environmental Protection Agency, stating, " '[a]s in the past, EPA will contend that the intermittent controls can be used only as an expedient, temporary control measure.' " (See Pet. App. 18a.)

In the course of presenting the Conference Report on the 1974 amendment to the Senate, Senator Muskie, Chairman of the Subcommittee on Environmental Pollution and manager of the bill in the Senate, stated (120 Cong. Rec. S. 10409 (daily ed. June 12, 1974)):

> * * * [N]o one should view limited application of enforceable strategies related to this legislation as a precedent for future legislation or as a reinterpretation of the requirements of the existing law which bar the application of intermittent control strategies as a substitute for emission limitations.

When finally enacted, the Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93–319, 88 Stat. 246, added a new Section 119 to the Clean Air Act, 42 U.S.C. (Supp. IV) 1857c–10, which permits certain power plants and other large emission sources that convert from burning oil or natural gas to burning coal to obtain temporary relief from air pollution control requirements and thereby to use intermittent controls temporarily if certain specified conditions are met. One of the conditions is that the source in question must enter into binding contracts to acquire either a long-term supply of low-sulphur

coal or a "continuous emission reduction system." Whichever alternative is chosen, the arrangement must achieve the necessary degree of emission reduction not later than December 31, 1978. Use of intermittent controls after that date is not permitted. See Sections 119(c)(2)(B) and (C), 42 U.S.C. (Supp. IV) 1857c–10(c)(2)(B) and (C).

Since the purpose of this legislation was to encourage certain power plants to convert from oil or gas to coal and to provide relief to those plants that switched to coal because of the oil supply interruption, it is inconceivable that Congress intended to impose on such sources a greater burden than if they had not converted. Accordingly, Congress must have assumed that intermittent controls were not permitted prior to the 1974 amendment.[10]

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[10] On March 18, 1976, the House Committee on Interstate and Foreign Commerce ordered that H.R. 10498, a bill further amending the Clean Air Act, be reported favorably to the House. Section 103(a) of that proposed bill would add a new Section 121(a) to the Clean Air Act which would define the term "means of emission limitation" for purposes of that Section as "a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics) * * *." A comparable provision, defining "emission limitation" as a requirement limiting the emission of air pollutants on a continuous basis, is included as Section 33(i) of a similar bill to amend the Clean Air Act currently pending before the Senate Committee on Public Works. If adopted, these bills would remove any residual ambiguity in the expression of the congressional intention that state implementation plans must require the use of continuous emission limitations when available.

Moreover, Section 5(b) of the Senate bill would amend Section 110(a)(2)(B) of the Clean Air Act to provide that the Administrator must approve a state submitted implementation plan if, among other requirements, "it includes emission limitations, schedules, and timetables for compliance with such limita-

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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tions, and, in addition, as may be necessary, (i) to assure attainment and maintenance of such primary or secondary standard, such other measures, including, but not limited to * * * enforceable supplemental emission reduction strategies for existing nonferrous smelters * * *."

Section 121(c)(3)(A) of the House bill would provide that the owner of an existing nonferrous smelter may receive up to two five-year extensions of the date for compliance with any requirement of a state implementation plan upon a demonstration that it is necessary to use other measures, presumably including dispersion techniques, to attain and maintain national ambient air quality standards if the Administrator has determined that no "means of emission limitation" (as that term is defined above) necessary for compliance with such requirement is reasonably available.

Thus, both houses of Congress have recognized that before nonferrous smelters may, for an extended period of time, rely upon supplemental control techniques to comply with state implementation plans, the present Clean Air Act must be amended. Furthermore, the pendency of these amendments demonstrates that Congress is aware of the problems of the smelter industry and is considering whether special treatment is appropriate. If the Act is duly amended along the lines suggested by the proposed legislation, the question presented in this case may be of no prospective significance.

U.S. GOVERNMENT PRINTING OFFICE: 1976